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Notice

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA HOUSING AUTHORITY, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OP. NO. 853, PERB CASE NO. 05-U-20 (SEPTEMBER 28, 2006).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employees Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (4) by the acts and conduct set forth in Slip Opinion No. 853.

WE WILL cease and desist from taking reprisal against Yvonne Smith for engaging in protected activities.

WE WILL NOT, in any like or related manner interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act.

District of Columbia Housing Authority

Date:_____ By:_____
Director

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may directly contact the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 28, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Nurses Association,	
Petitioner,	PERB Case No. 06-CU-02
and	Opinion No. 854
District of Columbia Child and Family Services Agency,	**FOR PUBLICATION**
Agency.	

ORDER[1]

The Board, having considered the "Compensation Unit Determination Petition" filed by the District of Columbia Nurses Association ("DCNA") and the Office of Labor Relations and Collective Bargaining (on behalf of the District of Columbia Child and Family Services Agency), hereby determines that the appropriate compensation unit for all registered nurses employed by the District of Columbia Child and Family Services Agency[2], is Compensation Unit 13.

IT IS HEREBY ORDERED THAT:

1. The Compensation Unit Determination Petition" filed by DCNA, is granted.

2. The registered nurses employed by the District of Columbia Child and Family Services Agency are placed in Compensation Unit 13.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 30, 2007

[1]The Board has decided to issue its Order now. A decision will follow.

[2]On June 6, 2006, DCNA was certified as the exclusive representative for all registered nurses employed by the District of Columbia Child and Family Services Agency. (See PERB Case No. 05-RC-03, Certification No. 135).

Government of the District of Columbia

Public Employee Relations Board

In the Matter of: American Federation of State, County and Municipal Employees, District Council 20, Local 2401 (on behalf of Albert Jones), Petitioner, and Office of the Attorney General for the District of Columbia, Respondent.	PERB Case No. 07-A-01 Opinion No. 856 **FOR PUBLICATION**

DECISION AND ORDER

I. Statement of the Case:

On November 17, 2006, the American Federation State, County and Municipal Employees, District Council 20, Local 2401 ("AFSCME"), filed an Arbitration Review Request. AFSCME seeks review of an Arbitration Award ("Award") that sustained the termination of bargaining unit member Albert Jones ("Grievant").

Arbitrator Lawrence S. Coburn was presented with the issue of whether the Office of the Attorney General for the District of Columbia had cause to terminate the employment of Albert Jones and if not, what should be the remedy. (See Award at p. 2). The Arbitrator found that the "Grievant was terminated for cause as provided under Article 7, Section 1 of the parties' Collective Bargaining Agreement." (Award at p. 9). Therefore, the Arbitrator denied the grievance. AFSCME is seeking review of the Award on the ground that the Award on its face is contrary to law and public policy. (See Request at p. 2).

The Office of Labor Relations and Collective Bargaining ("OLRCB") on behalf of the Office of the Attorney General for the District of Columbia opposes the Arbitration Review Request ("Request"). OLRCB is requesting that the Board deny AFSCME's request for two reasons. First, OLRCB claims that AFSCME's request is untimely. (See OLRCB's Opposition at p. 2). Second, OLRCB asserts that AFSCME has failed to establish that the award is contrary to law and public policy. (See OLRCB's Opposition at p. 6).

The issues before the Board are whether AFSCME's Request is timely and whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02 (6) (2001 ed.).

II. Discussion

The Grievant was employed by the Office of the Attorney General for the District of Columbia ("OAG") as an investigator in its Family Services Division. "In that position, [the] Grievant's principal duties included serving subpoenas and other legal documents on witnesses and parties in child abuse and neglect cases pending in Family Court. Typically, [the] Grievant was given the name and address of an individual whom he was supposed to serve, and he then proceeded to serve the individual. On the back of the document to be served, there was space for him to write the method of service. For example, if he personally handed the document to the individual in question, he would so indicate on the return of service." (Award at p. 2).

"Typically, an investigator does not have a photograph or other physical description of the individual whom he is to serve, unless the individual has a criminal record. The investigator has the option of asking an individual he is about to serve for photo identification, or of merely asking the individual if he or she is the individual he is seeking to serve. If a subpoenaed witness fails to appear in court to testify on the date specified on the subpoena, the judge has the authority to send a U.S. Marshall to bring the witness to court." (Award at p. 3).

On August 4, 2005,[1] Assistant Attorney General Denise McKoy requested that a subpoena be served on Ellen Johnson, requiring her to appear in court for a child abuse/neglect case scheduled for August 26, 2005. Ms. Johnson's address was listed on the request form, and the subpoena was assigned to the Grievant for personal service. "The Grievant, who noticed that he already had served David Suggs at the same address, complained that he was not given both subpoenas at the same time. When the Grievant was told that Ms. Johnson's testimony was necessary at the hearing, he proceeded to the address in question. Ms. McKoy later received from [the] Grievant a return of service form stating that he had personally served the subpoena on Ms. Johnson on August 9 at 11:50 a.m." (Award at p.4).

[1] All dates noted in this opinion refer to calendar year 2005 unless otherwise stated.

Ms. Johnson, did not appear at the August 26, 2005, court hearing. As a result, Ms. McKoy presented to the judge the Grievant's return of service, affirming that he had personally served a subpoena on Ms. Johnson on August 9th at 11:50 a.m. However, another witness at the hearing, Ms. Johnson's boyfriend, (Mr. Suggs), told the judge that Ms. Johnson could not have been served the subpoena on August 9th at 11:50 a.m. because she was working at that time. The boyfriend provided Ms. McKoy with Ms. Johnson's work telephone number. Subsequently, Ms. McKoy's supervisor called Ms. Johnson and confirmed on the telephone that she had not been served with a subpoena. In addition, Ms. Johnson indicated that she had been at work on August 9th when the Grievant stated that he had served her. Ms. Johnson then went to the courthouse and testified later in the day. The Grievant was on vacation leave that day. As a result, Ms. McKoy was unable at that time to ask him about his service of the subpoena.

After the trial, Ms. McKoy contacted the Grievant's supervisor via e-mail concerning the discrepancy between the return of service and Ms. Johnson's representation that she had not been served with the subpoena. Thereafter, the Grievant went to Ms. McKoy's office and told her that he had served the subpoena on Ms. Johnson.

Marian Spears, the Grievant's supervisor, asked the Grievant about his service of the subpoena on Ms. Johnson. According to Ms. Spears, the Grievant told her that he had served the subpoena on Ms. Johnson's boyfriend, and that Ms. Johnson was behind the door when he effected service.

James K. Murphy, Chief of Investigations for the OAG, having first spoken with Ms. McKoy about the issue involving service of the subpoena on Ms. Johnson, then conducted an investigation of the matter. He first interviewed Ms. Johnson, who confirmed that the Grievant had not served the subpoena on her, and produced time records showing that she was at work at the time that the Grievant had claimed to have personally served her at home. Mr. Murphy then spoke with the Grievant, who said that he had given the subpoena to David Suggs at Ms. Johnson's apartment. According to the Grievant, there was a woman standing inside the doorway. When asked if he had spoken to the woman, the Grievant replied that he had not, but had assumed that it was Ms. Johnson. When asked to describe the woman in the doorway, the Grievant said that he could not.[2]

[2] "The investigation also encompassed two other incidents in which [the] Grievant allegedly had failed to serve documents on individuals whom he had certified that he had served. Because the Agency did not significantly rely on the other two incidents, which were characterized by Chief Administrative Officer Michael Hailey as 'questionable,' [the Arbitrator indicated that he did] not describe[] or consider[] the facts surrounding these two incidents." (Award at p. 4, n. 2).

"Following the investigation, Mr. Murphy issued a report concluding that [the] Grievant had knowingly and intentionally provided false information on the return of service for Ms. Johnson. Further, Murphy recommended that [the] Grievant be issued an official letter of reprimand, suspended from duty without pay for ten days, and then removed from his position as an investigator. After reviewing Mr. Murphy's report, Michael Hailey, Chief Administrative Officer for the OAG, recommended to the Attorney General that [the] Grievant be immediately terminated from the OAG. The Attorney General concurred, and by letter dated October 14, [the] Grievant [was given 30 days] . . . notice proposing that he be removed as an investigator. The reasons for the termination were:

> (1) conduct unbecoming of an OAG employee; (2) an on-duty act that you knew or should reasonably have known is a violation of law; and (3) an on-duty act that interferes with the efficiency or integrity of government operations [by, among other things, deliberately providing false information on Ellen Johnson's Return of Service that was submitted to the Family Court.]" (Award at p. 5).

"In a letter dated October 18th, [the] Grievant ... denied the allegations contained in the October 14th letter. In his [October 18th] letter, [the] Grievant did not provide an explanation of the circumstances surrounding his alleged service of Ms. Johnson." (Award at p. 5).

On October 26, AFSCME filed a grievance requesting that the termination be rescinded. Subsequently, in a letter dated November 16th the OAG issued its final decision to terminate the Grievant's employment. The grievance filed by AFSCME was not resolved. As a result, AFSCME filed for arbitration on behalf of the Grievant. (See Award at p. 5).

At Arbitration the OAG argued that it had cause to discharge the Grievant because he falsified a return of service on August 9th. Specifically, the OAG claimed that the Grievant deliberately provided false information on the return of service by stating that he had personally served Ms. Johnson, when he had not. In support, of its position the OAG asserted that: (1) Ms. Johnson was at work at the time; (2) the Grievant certified that he personally served her at home; and (3) the Grievant admitted to Mr. Murphy, Chief of Investigations, that he had left the subpoena with Derek Suggs, a friend of Ms. Johnson, at Ms. Johnson's residence. "Moreover, the OAG, pointed to the Grievant's shifting story at the hearing, arguing that one cannot believe his testimony that he served the subpoena on a woman who allegedly acknowledged that she was Ms. Johnson." (Award at p. 5).

Furthermore, the OAG contended that the Grievant had no basis for assuming that Ms. Johnson was the woman who was nearby when he served the subpoena on Mr. Suggs. The OAG acknowledged that investigators are not required to have individuals produce identification documentation; however, the OAG insisted that investigators are required to ask the individuals if they are the ones whose names are on the subpoenas. Had the Grievant done so, the OAG claimed that it is highly unlikely that the woman would have confirmed that she was. Also, the OAG argued

that individuals often deny their identity to avoid service, but they rarely, if ever, will lie about their identity in order to receive service.

In addition, the OAG claimed that the Grievant's credibility as an investigator had been severely compromised by his falsification of the Johnson return of service. Moreover, the OAG argued that there was no way to rehabilitate the Grievant's credibility in the eyes of the Family Court. Thus, the Grievant could no longer serve documents - an essential function of the investigator position. As a result, OAG asserted that "a lesser form of discipline would not be appropriate." (See Award at p. 6).

AFSCME countered that the parties' collective bargaining agreement ("CBA") required progressive discipline. Also, citing Article 7, Section 3 of the parties' CBA, AFSCME claimed that discipline by the OAG "shall be primarily corrective, rather than punitive in nature." (Award at p. 9) In addition, AFSCME emphasized that the OAG, contrary to its obligations under Article 10, Section 3 of the parties' CBA, had no written procedures to guide investigators on how they should serve subpoenas or complete returns of service. Also, AFSCME asserted that "the investigator witnesses, including one testifying on behalf of the [OAG], confirmed that there was no standard procedure requiring an investigator to ask individuals for identification documentation before serving subpoenas on them. [For example, AFSCME pointed out that] investigator William Dupree testified that, notwithstanding his repeated requests that the Agency define what constitutes 'personal service', no such definition was forthcoming. Instead, Mr. Dupree testified that, in his experience, the definition of personal service varies depending on which Assistant Attorney General is handling a case." (Award at p. 6).

Furthermore, AFSCME asserted that the OAG provided the Grievant with no physical description or photograph of Ms. Johnson, and that the woman served identified herself as Ellen Johnson. Under these circumstances, AFSCME argued that the Grievant's return of service, stating that he had personally served Ms. Johnson, was in good faith.

Finally, AFSCME contended that contrary to the OAG's position, there was no competent evidence to support the OAG's claim that the Grievant's credibility before the Family Court was irreparably damaged. Accordingly, any discipline of the Grievant should have been corrective. In that contention, AFSCME pointed out that the OAG provided no reason why, in the future, an Assistant Attorney General would have to advise the Court that the Grievant had erroneously completed a return of service. AFSCME also cited the fact that the OAG could promulgate written procedures for serving subpoenas, which would mitigate any credibility issues raised by retaining the Grievant as an investigator. Alternatively, AFSCME claimed that the OAG could have transferred the Grievant, a fourteen-year employee with an excellent performance record, to another position.

In an Award issued August 21, 2006, Arbitrator Lawrence Coburn found that "[i]t is undisputed that [the] Grievant did not serve a subpoena on Ellen Johnson on August 9, contrary to his certification on the return of service." (Award at p. 7) As a result, the Arbitrator indicated that

the question then becomes whether the Grievant falsified the return of service or whether, having made a reasonable inquiry, he stated in good faith that he had served her.

The Arbitrator noted that the Grievant testified at the hearing that:

- When Derek Suggs came to Ms. Johnson's door, the Grievant asked for Ellen Johnson;
- Mr. Suggs then left, returning momentarily with a woman, whom the Grievant asked: "Helen Johnson?"
- When the woman replied, "Yeah," the Grievant handed her the subpoena.

The Arbitrator reasoned that "if believed, this account would exonerate [the] Grievant. It would simply be a matter of mistaken identity, after [the] Grievant had made a reasonable inquiry. However, the Arbitrator concluded that the problem with the Grievant's account at the hearing . . . is that it differed markedly from what he had told others shortly after the incident. For example, [the Arbitrator noted that] during the official investigation of the matter, [the Grievant] told Chief of Investigations Murphy that he had handed the subpoena to Mr. Suggs, not the woman. In addition, [the] Grievant earlier had told Marian Spears, his supervisor, that he had served the subpoena on Ms. Johnson's boyfriend, and that Ms. Johnson was behind the door when he effected service." (Award at p. 7).

The Arbitrator concluded that neither Mr. Murphy nor Ms. Spears had any motive to lie. Moreover, he found that each testified credibly at the hearing and noted "that [the] Grievant had told them on separate occasions that he had served the subpoena on a man, not a woman who had identified herself as Ms. Johnson." (Award at p. 7).

The Arbitrator determined that the Grievant, on the other hand, had a motive to lie at the hearing - to save his job. In addition, the Arbitrator noted that the Grievant's version of the events changed between the time he testified on direct and when he testified on cross - examination. He pointed out that "[o]n direct examination, [the] Grievant testified that when Mr. Suggs came to the door, he asked for Ms. Johnson. Mr. Suggs told [the] Grievant to wait a minute and came back with a woman. According to [the] Grievant, he 'just handed her the envelope and proceeded down the steps.' On cross examination, [the] Grievant initially confirmed his earlier testimony. When pressed, however, about whether he had asked the woman to identify herself, Grievant testified that, when Mr. Suggs brought the woman to the door, Grievant said, 'Helen [sic] Johnson?' And the woman replied, 'Yeah'." (Award at p. 7).

Furthermore, the Arbitrator indicated that the "Grievant's ever-changing story does not inspire confidence in the accuracy of his testimony at the hearing. Notably, too, when offered an opportunity before he was discharged to respond to the [OAG's] charges that he had falsified his return of service on August 9 [the] Grievant merely stated that he denied what Chief of Investigations Murphy had reported. Notably, the Grievant did not state that he had served the

subpoena on a woman who had acknowledged to him that she was Ms. Johnson." (Award at pgs 7-8).

The Arbitrator concluded by stating the following:

> Under these circumstances, I conclude that the Grievant handed the subpoena to Mr. Suggs, and that the woman near the door, if she was there at all, did not state that she was Ms. Johnson.[3] Instead, I conclude that [the] Grievant handed the subpoena to Mr. Suggs when he answered the door, with or without a woman nearby. I also find it implausible that any woman would have stated that she was Ms. Johnson, because she would have had no apparent motive for doing so. As a witness stated at the hearing, individuals may lie to avoid service of a legal document, but hardly ever lie to accept service.
>
> [T]he Grievant undoubtedly thought that Mr. Suggs would give the subpoena to Ms. Johnson, who lived at the same address, and that he could safely (though falsely) state that he had personally served Ms. Johnson. It is unlikely that [the] Grievant would have falsely completed the return of service with a malicious intent to undermine the Assistant Attorney General's case involving Mr. Suggs and Ms. Johnson. However, even absent a malicious intent, it is a very serious offense to falsely complete a legal document such as a return of service, particularly when the Assistant Attorney General and the Family Court Judge were likely to rely on his certification on the return of service if Ms. Johnson did not appear in court on the appointed day. By falsely stating that he had personally served Ms. Johnson, [the] Grievant committed a serious breach of trust.
>
> When an employee whose trust is essential to his job betrays that trust, absent a contractual, regulatory or statuary restriction, his employer generally has cause to remove him form his position and terminate his employment. [The] Grievant betrayed the trust placed in him by the Agency by certifying that he had served the subpoena on Ms. Johnson when he had not. His false statement caused

[3] The Arbitrator indicated that "[t]here [was] considerable doubt whether a woman, other than Mr. Suggs' fourteen-year old daughter, was at the house. When asked by Chief of Investigations Murphy to describe the woman, [the] Grievant said that he could not remember what she looked like. In addition, Ms. Johnson testified that she would not have expected any woman to be at her residence other than Mr. Suggs' daughter." (Award at p. 8, n. 3).

> embarrassment to the Agency, disruption to the Family Court proceeding at which Ms. Johnson was supposed to testify, and a loss of [the] Grievant's credibility in the eyes of the Agency and of the Family Court.
>
> The Union asserts that the restrictions in the Collective Bargaining Agreement require reinstatement of the Grievant. I disagree. A breach of trust such as the one in this case provides "cause," as that term generally is used, for an employer to discharge an employee. Moreover, the Union has not cited any provision of the D.C. Official Code § 1-616.51 (2001 ed.). That would limit the [OAG's] decision to remove [the] Grievant from his position under the circumstances present in this case.
>
> The Union also cites Article 7, Section 3 of the Collective Bargaining Agreement, which requires that discipline be appropriate to the circumstances, and "shall be primarily corrective, rather than punitive in nature." For certain serious offenses, such as a breach of trust, discharge is appropriate, without progressive discipline. To remove an employee for such an offense is not punitive, it is practical. Once an employee has seriously breached his employer's trust, the employer understandably loses confidence in the employee's capacity for honest dealing in the future. That is what happened here, and the [OAG] properly concluded that corrective action lesser than removal was inappropriate.
> (Award at pgs. 8-9)

The Arbitrator also rejected AFSCME's claim that the "[OAG's] failure to promulgate written procedures on how to serve documents left the Grievant without sufficient guidance on how personal service was to be accomplished . . . [The Arbitrator noted that] [w]ith respect to such fundamental issues, the Grievant cannot claim in good faith that he did not know what he was supposed to do." (Award at p. 9).

Likewise, the Arbitrator rejected AFSCME's argument that the OAG should have provided the Grievant with photo identification or a physical description of Ms. Johnson before he attempted to serve her. The Arbitrator indicated that this argument misses the point. Specifically, if the Grievant merely had mistakenly served a woman who had identified herself as Ms. Johnson, he would not be losing his job.

AFSCME contends that the Arbitrator's decision to uphold the Grievant's termination in light of the facts in the record, is contrary to law and public policy. (See Request at p. 2) As a result, AFSCME is requesting that the Board reverse the Arbitrator's award and reinstate the Grievant to his position as a CFSA Investigator and that the Grievant receive back pay with interest.

Also, AFSCME is asking the Board to allow both parties to submit a more detailed brief fully explaining their positions in order to completely dispense of this matter.

OLRCB opposes AFSCME's Request on the grounds that: (1) AFSCME's submission is untimely and (2) AFSCME has failed to establish that the award is contrary to law and public policy.

With respect to timeliness, OLRCB asserts that AFSCME's request does not comply with the twenty (20) day requirement of Board Rule 538.1. In support of this position OLRCB states the following:

> In the instant case, the parties agreed at the conclusion of the arbitration hearing that the arbitrator would issue his Award to the parties in Portable Data Format (pdf) via email transmission within 30 days of receipt of the post-hearing briefs, which were to be postmarked no later than August 11, 2006. . . .Consistent with this agreement, on August 21, 2006, the Arbitrator issued his Award via email to the parties, including Joseph Bradley, who represented the Union at the arbitration hearing, and the Union President Deborah Courtney. See Respondent's Exhibit 1, Arbitrator Coburn's email to parties transmitting Invoice and Award. Thus, consistent with PERB Rule 538.1 and DCGH [case]. The Union had 20 days from the transmittal and receipt of the Award on August 21, 2006, i.e. until September 11, 2006, to file its Arbitration Review Request with PERB. (OLRCB's Opposition at p. 4).

AFSCME counters that "the parties agreed to accept 'issuance' of Arbitrator Coburn's award via email. However, the parties did not stipulate that service of the award via electronic mail would be sufficient." (Request at pgs 6-7). As a result, AFSCME claims that on October 30, 2006 it transmitted a letter (via e-mail and U.S. Mail) to the Arbitrator. The October 30th letter states in pertinent part as follows:

> As I understand the Opinion and Award ("Opinion") in this matter was issued to the parties via electronic mail upon oral consent of the parties. However, we do not have any record of the date the Opinion was served upon the parties. According to the Superior Court Rules of Civil Procedure, service via electronic mail is sufficient only when the party to be served has consented to service via electronic mail in writing. As I understand, the transcript reflects that the parties consented only to issuing the Opinion via electronic mail in a pdf format, but not to service of the Opinion via electronic Mail. Furthermore, the Public Employee Relations Board Rules do not provide for service by electronic mail. In order to preserve AFSCME's rights in appealing this matter, please accept this letter

> as written consent to serve the Opinion by electronic mail as of this date. Please serve the Opinion to my attention . . . and to AFSCME's Representative, Joseph Bradley. . . We will evaluate AFSCME's rights to appeal from the date of your service upon us via electronic mail. . . AFSCME's Exhibit 1. See also Request at pgs. 6-7).

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

> **538.1 - Filing**
> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award . . . .** (Emphasis added).
>
> **501.4 - Computation - Mail Service**
> Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.** (Emphasis added)
>
> **501.5 - Computation - Weekends and Holidays**
> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . .**Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation.** (Emphasis added)

In the present case, AFSCME acknowledges and the transcript reflects that the parties agreed that the Arbitrator could issue the award via electronic mail in a pdf format. (See, Request at p. 6 and AFSCME's Exhibit 1, Tr. at p. 204 ¶11-22 and p. 205 ¶ 1-4).) As a result, Arbitrator Coburn issued his Award via e-mail on August 21, 2006. (See Award at p. 7). However, AFSCME argues that "the parties did not stipulate that service of the award via electronic mail would be sufficient." (Award at p. 7) As a result, AFSCME contends that the August 21, 2006, service date is not what triggers the twenty day requirement of Board Rule 538. Rather, AFSCME claims that the October 30, 2006, service date is what triggers the twenty day filing requirement of Board Rule 538. In support of this argument, AFSCME claims that pursuant to the Superior Court Rules of Civil Procedure, service via electronic mail is sufficient only when the party to be served has consented in writing to service via electronic and in this case AFSCME did not submit such written consent until October 30, 2006. Therefore, AFSCME asserts that the October 30, 2006 date is the operative factor that triggers the computation of the twenty day filing requirement noted in Board Rule 538.1. Also, AFSCME argues that Board Rules do not provide for service by electronic mail. In light of the above, AFSCME asserts that their November 17, 2006 filing was timely.

As noted above, AFSCME argues that pursuant to the Superior Court Rules of Civil Procedure, service via electronic mail is sufficient only when the party to be served has consented in writing to service via electronic mail. AFSCME asserts that since they did not provide their written consent until October 30, 2006, they had until November 20, 2006 to file their Request. Therefore, their November 17, 2006, filing was timely. We believe that while this argument may be of some importance to proceedings before the Superior Court, it is not controlling with respect to determining the sufficiency of service in proceedings before the Board. See District of Columbia General Hospital and Doctors' Council of the District of Columbia General Hospital, 46 DCR 8345, Slip Op. No. 493 at p. 3, n. 3, PERB Case No. 96-A-08 (1996). Therefore, we find that this argument lacks merit.

AFSCME also claims that Board Rules do not provide for electronically transmitted awards as meeting the Board's requirement for service. (See AFSCME's Exhibit 2). Board Rule 501.16 provides in pertinent part that "[s]ervice of pleadings shall be complete on personal delivery . . . depositing the document in the United States mail or by facsimile." Also, Board Rule 599 defines pleadings as "[c]omplaint(s), petition(s), appeal(s), request(s) for review or resolution(s), motion(s), exception(s), brief(s) and responses to the foregoing. In light of the above, we believe that Board Rule 501.16, concerns the service of a pleading filed with the Board and not the service of an award issued by an arbitrator on parties that participated in an arbitration proceeding." Even assuming arguendo that Board Rule 501.16 is applicable in this case, we have previously found that "[t]he Board's Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended." District of Columbia General Hospital and Doctors' Council of the District of Columbia General Hospital, 46 DCR 8345, Slip Op. No. 493 at p. 3, PERB Case No. 96-A-08 (1996). AFSCME's argument that although the parties agreed to accept issuance of Arbitrator Coburn's award via e-mail, the parties did not stipulate that service of the award via electronic mail would be sufficient, is such an application of our Rules. While the Award transmitted to AFSCME on August 21, 2006, was not served by one of the methods of service noted in Board Rule 501.16, we find under these facts that the impact of this requirement is one of form rather than substance when, as here, the parties agreed on the record that the Award could be issued by e-mail and AFSCME does not contend that the Award transmitted by e-mail on August 21, 2006, differs in any way from the Award transmitted by e-mail on October 30, 2006. Moreover, we find no reasonable basis for discounting AFSCME's receipt of the August 21, 2006 Award for purposes of commencing the time that AFSCME had to file its Arbitration Review Request under Board Rule 538. In light of the above, we do not find AFSCME's argument to be persuasive. Therefore, we reject AFSCME's second argument.

In view of the above, we find no merit to AFSCME's arguments. Furthermore, there is no dispute that the Award was transmitted to the parties by e-mail on August 21, 2006. Therefore, pursuant to Board Rule 538.1, AFSCME was required to file their Request within twenty days after the August 21, 2006, service date, or by September 11, 2006. However, AFSCME did not file their

request until November 17, 2006. Thus, AFSCME's filing was sixty seven (67) days late. For the reasons discussed above, AFSCME's filing is not timely.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, Public Employee Public Employee Relations Board, 655 A.2d 320, 323 (DC 1995). Therefore, the Board cannot extend the time for filing an Arbitration Review Request. As a result, we dismiss AFSCME's Arbitration Review Request because it is untimely.[4]

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation State, County and Municipal Employees, District Council 20, Local 2401's Arbitration Review Request, is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D. C.

December 21, 2006

[4]In light of this determination, it is not necessary for the Board to consider whether "the award on its face is contrary to law and public policy."

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Teamsters Local Union No. 639, a/w International Brotherhood of Teamsters,	
Petitioner,	
v.	PERB Case No. 07-E-01
	Opinion No. 857
District of Columbia Public Schools, Division of Transportation,	Petition for Enforcement
	FOR PUBLICATION
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On October 27, 2006, Teamsters Local Union 639 a/w International Brotherhood of Teamsters ("Teamsters"), filed a document styled "Petition to Enforce Order Denying Arbitration Review Request" ("Petition"), regarding PERB Case No. 06-A-14 (Slip Op. No. 852). The Teamsters allege that the District of Columbia Public Schools, Division of Transportation ("DCPS") has failed to comply with Slip Op. No. 852 which was issued on September 22, 2006. Specifically, the Teamsters claim that DCPS has failed to implement the terms of an arbitration award issued on April 11, 2006 and affirmed by the Board on September 22, 2006. (See Petition at pgs. 1 and 3). The Teamsters are asking the Board to: (1) find that DCPS has failed to comply with the Board's Order in Slip Opinion No. 852; and (2) bring an action in the Superior Court of the District of Columbia to compel DCPS to comply with the Board's Decision and Order.

DCPS' counsel was served with a copy of the Petition; however, DCPS did not file an opposition to the Petition. The Teamsters' Petition is before the Board for disposition.

II. Discussion

On May 2, 2006, DCPS filed an Arbitration Review Request ("Request") seeking review of an April 11, 2006 arbitration award ("Award") issued by Arbitrator David Vaughn.[1] The April 11th Award reduced the adverse action taken against bargaining unit member Karen Wise from a termination to a thirty (30) day suspension. DCPS' request was designated as PERB Case No. 06-A-14. The Teamsters opposed DCPS' Request.

In their Request, DCPS argued that "[t]he Arbitrator erred by substituting his own judgment for that of the Federal Court-appointed Transportation Administrator with respect to the severity of the discipline issued." (Request at p. 8). In addition, DCPS asserted that the "Arbitrator was without authority and exceeded his jurisdiction under the controlling Agreement between [DCPS] and the Union to the extent that the Opinion and Award conflicts with the express terms of the Agreement and imposes additional obligations not expressly provided for in the Agreement." (Request at p. 10). Lastly, DCPS claimed that "[t]he Opinion and Award [was] contrary to law and public policy to the extent that Arbitrator Vaughn found that DCPS failed to consider 'all relevant circumstances." (Request at p. 13).

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[1]In an Award issued on April 11, 2006, Arbitrator David Vaughn found that Article XVII of the parties' collective bargaining agreement ("CBA") provides DCPS with the authority to terminate an employee whose actions "may be detrimental to the efficiency and discipline of the school system. However, the Arbitrator also concluded that summary discharge of an employee without due process, including the right of an employee to be heard prior to a decision being made, as well as consideration of all relevant circumstances prior to discharge, is contrary to the CBA's 'just cause' provision." (Award at p. 20)

Consequently, the Arbitrator found that DCPS failed to: (1) provide the Grievant with an opportunity to present her side of the story prior to the determination to discipline her; and (2) take into account all relevant circumstances prior to making the disciplinary determination. (See Award at p. 21). In addition, the Arbitrator determined that DCPS proved just cause to discipline the Grievant for her conduct in her confrontation with her supervisor Keith Pettigrew, however, it failed to prove that she assaulted Mr. Pettigrew. (See Award at p. 24). Also, the Arbitrator concluded that while DCPS proved the Grievant's conduct to be insubordinate, the circumstances served to mitigate her conduct. (See Award at p. 25). The Arbitrator also took into consideration the lack of any prior discipline against the Grievant. (See Award at p. 25). In light of the above, the Arbitrator decided that the proven conduct did not support the penalty of termination. (See Award at p. 25).

As a remedy, the Arbitrator directed that the Grievant's termination be rescinded and the penalty for her misconduct be reduced to a thirty-day unpaid disciplinary suspension.

In Slip Op. No. 852 the Board found that DCPS did not meet the requirements for reversing Arbitrator Vaughn's Award. In addition, the Board indicated that the Arbitrator's conclusions: (1) were supported by the record; (2) were based on a thorough analysis; and (3) could not be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' collective bargaining agreement. Therefore, the Board concluded that no statutory basis existed for setting aside the Award. (See Slip Op. No. 852 at p. 9). As a result, DCPS' Request was denied.

On October 27, 2006, the Teamsters filed a Petition for Enforcement with the Board. The Teamsters contend that DCPS has failed to comply with Slip Op. No. 852. Specifically, the Teamsters assert that despite the Board's denial of DCPS' Request, DCPS has not reinstated and made Ms. Wise whole as directed by Arbitrator Vaughn's Award. As a result, the Teamsters are requesting that the Board initiate an enforcement proceeding in the Superior Court of the District of Columbia in order to compel DCPS to comply with the terms of Arbitrator Vaughn's Award which was affirmed by the Board in Slip Op. No. 852.

The certificate of service which is attached to the Teamsters' Motion indicates that on October 27, 2006, DCPS' counsel was served with a copy of the Motion via first class mail, postage prepaid.[2] However, DCPS did not file a response to the Teamsters' Motion.

After reviewing the Teamsters' Motion, it is clear that DCPS has not complied with Arbitrator Vaughn's Award. As a result, the Board must determine if DCPS' action is reasonable.

In the present case, the Teamsters filed for arbitration on behalf of Karen Wise and on April 11, 2006, Arbitrator Vaughn issued his Award. Subsequently, on May 2, 2006, DCPS filed an Arbitration Review Request seeking that the Board reverse the award. In Slip Op. No. 852 issued on September 22, 2006, the Board denied DCPS' Request. Pursuant to D.C. Code § 1-617.13(c) "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in the Superior Court of the District of Columbia by filing a request within 30 days after the final order has been issued." See also, Superior Court Civil Rules, Part XV, Agency Review, Rule 1. Slip Op. No. 852 was issued on September 22, 2006, and the Order in Slip Op. No. 852 indicates that pursuant to Board Rule 559.1 the Decision and Order is final upon issuance. Therefore, the 30-day period for filing an appeal with the Superior Court has expired. Moreover, no appeal has been filed with the Superior Court of the District of Columbia. In light of the above, DCPS has waived its right to appeal the September 22, 2006 Decision and Order.

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[2]On November 28, 2006, the Board's Executive Director contacted both the Teamsters' counsel and DCPS' counsel and confirmed that DCPS' counsel had received a copy of the Teamsters' Motion.

As previously discussed, Arbitrator Vaughn's Award was issued on April 11, 2006 and the Board's decision denying DCPS' Arbitration Review Request was issued on September 22, 2006. Thus, it has been seven months since Arbitrator Vaughn's Award was issued and two months since our Order was issued. We believe that DCPS has had more than a reasonable period of time to comply with the terms of the Arbitrator Vaughn's Award. Moreover, DCPS can no longer appeal the Board's Decision and Order in the Superior Court of the District of Columbia. In view of the above, no legitimate reason exist for DCPS' continued refusal to implement Arbitrator Vaughn's Award.

For the reasons noted above, we find that DCPS has not complied with Slip Op. No. 852; therefore, the Teamsters' Petition for Enforcement is granted. The Board will seek judicial enforcement of our September 22, 2006 Decision and Order, as provided under D.C. Code § 1-617.13(b) (2001 ed.).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Teamsters Local Union 639 a/w International Brotherhood of Teamsters' "Petition to Enforce Order Denying Arbitration Review Request", is granted.

2. The Board shall proceed with enforcement of Slip Op. No. 852 pursuant to D.C. Code § 1-617.13(b) (2001 ed.), if full compliance with Slip Op. No. 852 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 1, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, AFL-CIO, Local 872,	
Complainant,	PERB Case No. 07-U-02
v.	
	Opinion No. 858
District of Columbia Water and Sewer Authority,	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On October 5, 2006, the American Federation of Government Employees, AFL-CIO, Local 872 ("Complainant", "AFGE" or "Union"), filed an "Unfair Labor Practice Complaint" and a "Motion for a Decision on the Pleadings", in the above-referenced case. In its Complaint, AFGE alleges that the District of Columbia Water and Sewer Authority ("WASA") violated D.C. Code § 1-617.04 (a) (1) and (5) by failing to fully implement an Arbitrator's Award which reinstated bargaining unit members Donnell Banks and Cleveland Hill.

WASA filed an answer denying that it violated the Comprehensive Merit Personnel Act ("CMPA") and requested that the Board dismiss the Complaint. WASA did not file a response to the Complainant's "Motion for a Decision on the Pleadings". AFGE's "Motion for a Decision on the Pleadings" and WASA's "Motion to Dismiss" are before the Board for disposition.

II. Discussion

Donnell Banks and Cleveland Hill were employed by WASA as Water Services Workers in the Water Services Department until February 14, 2005. Banks' employment with WASA began in 1986 and Hill's in 1978.

On October 26, 2004, Banks and Hill were working together, wearing uniforms which identified them as WASA employees, and riding in a WASA-owned truck (with WASA identifying marks on the outside). They were arrested at approximately 11:40 a.m. in a high crime area of Washington, D.C., an area to which they had been assigned. Banks and Hill were charged with possession of marijuana and intent to distribute. Within a day or so of October 26, WASA management became aware of the arrests and began an investigation to determine whether internal discipline was appropriate.

The criminal charges against Banks and Hill resulted in a single trial, before a judge, on February 1, 2005. Each was convicted of the crime of "possession of marijuana." Banks and Hill were terminated from employment and removed from duty that day on February 14, 2005.

Banks and Hill grieved their terminations. The matter proceeded to arbitration before Arbitrator Jane Rigler. The issue before the Arbitrator was whether WASA had cause to terminate the employment of Donnell Banks and Cleveland Hill. In an Award issued on August 16, 2005, the Arbitrator indicated that it was "clear that . . .[Donnell Banks and Cleveland Hill] were each convicted of the crime of possession of marijuana . . . [and that]] [i]t is beyond dispute that criminal convictions must be established by proof beyond a reasonable doubt. [Moreover,] [n]either Banks or Hill . . . appealed [their] criminal conviction. [Furthermore,] [a]ll these facts support [a] conclusion that . . . WASA established that Banks and Hill possessed marijuana on October 26, 2004." (Award at pgs 4-5). The Arbitrator also found "that Banks' and Hill's convictions would adversely affect the public's perception of [WASA]." (Award at p. 5).

Despite her conclusion that WASA "had cause to discipline Hill and Banks, [the Arbitrator found]. . . that discharge was an unreasonable sanction." (Award at p. 6) She indicated that the infraction with which Hill and Banks were charged specified a range of discipline, from reprimand to removal, for a first offense. In addition, the Arbitrator observed that both Hill and Banks were longtime employees with "lengthy and blemish-free employment history." Id. In light of the above, the Arbitrator determined that the more appropriate sanction in this case was a "lengthy, unpaid suspension. The February 14, 2005, termination date, and the August 16, 2005 date of this award, mean that suspension will be in the neighborhood of six months." Id. The Arbitrator ordered that:

> DCWASA reinstate Cleveland Hill and Donnell Banks , without pay within ten calendar of its receipt of [the] award, and upon their reinstatement, treat them, for all purposes, as though they had been suspended, without pay, for the period of time between February 14, 2005 and the date of their reinstatement. (Award at p. 6).

WASA filed an Arbitration Review Request with the Board seeking reversal of the Award. WASA argued that the Award on its face was contrary to law and public policy because the Arbitrator's "decision [was] directly contrary to the strong public interest in maintaining a drug-free

workplace." (Request at p. 5) AFGE opposed WASA's Request on the grounds that: (1) WASA's submission was untimely and (2) WASA failed to establish a statutory basis for the Board's review.

In PERB Case No. 05-A-10, we determined that WASA's Request was timely. However, we found that none of the public policies identified by WASA, mandated removal of Banks and Hill. (See Slip Op. No. 843, issued on June 7, 2006.) We noted that WASA's argument involved a disagreement with the Arbitrator's ruling and a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." District of Columbia Water and Sewer Authority v. AFGE ,Local 872, Slip Op. No. 843 at p. 8, PERB Case No. 05-A-10 (2006). In light of the above, we denied WASA's Arbitration Review Request.

AFGE asserts that pursuant to the Award, WASA was required to reinstate Banks and Hill within ten days of the August 16, 2005 arbitration award. The grievants were not reinstated until July 24, 2006, and "[u]pon their reinstatement, WASA did not pay the grievants back pay for the approximate 11 month period from [the date] of issuance of the award until their reinstatement [date]." (Compl. at p. 3).

In light of the above, AFGE filed an unfair labor practice complaint on October 5, 2006 alleging that WASA is violating D.C. Code § 1-617.04(a)(1) and (5) by refusing to fully implement an award which directed that bargaining unit members Donnell Banks and Cleveland Hill be reinstated by a particular date.[1] AFGE is requesting that the Board issue a decision on the pleadings. In addition, AFGE is asking that the Board order WASA to: (1) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (2) fully implement the Award by paying the Grievants back pay with interest for the period from August 26, 2005 until the date of their reinstatement on or about July 24, 2006; and (3) pay reasonable costs. (See Compl. at p. 4).

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[1] D.C. Code § 1-617.04(a)(1) and (5) provide as follows:

> (a) The District, its agents, and representatives are prohibited from:
>
> (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
>
> • • •
>
> (5) Refusing to bargain collectively in good faith with the exclusive representative.

In accordance with Board Rule 520.6, WASA filed an answer denying that they have committed an unfair labor practice and asserting:

> It is well settled that a party's failure to comply with the terms of an arbitration award resulting from the parties agreed upon vehicle for resolving grieveable dispute concerns are a breach of a contractual obligation and "does not give rise to an unfair labor practices under the CMPA." . . . Thus, although the Board posses the authority to seek compliance with its decision and orders, there is no explicit statutory authority to seek compliance with decisions or awards rendered by third parties, e.g. arbitrators. . . . Accordingly, since no statutory basis exists for the PERB to consider the claim alleged, which is strictly contractual in nature, the complaint should be dismissed. . . .
>
> Further, contrary to the Union's contention, [WASA] did fully implement the arbitrator's award. The award is clear on its face and does not lend itself to the interpretation that the Union suggests. Specifically, nowhere in arbitrator's Rigler's award does the language indicate that the grievants are entitled to any back award under any circumstances. In fact, quite the contrary is suggested by arbitrator Rigler's refusal to retain jurisdiction of the matter during the implementation phases of her award. Also, it should be noted that, although the Union requested that the arbitrator retain jurisdiction in it's post hearing brief, arbitrator Rigler specifically declined to do so.
>
> * * *
>
> Finally, the Union's settlement request to [WASA] was clear and specific. It listed just two demands:
>
> 1. Payment of its Attorney fees; and
>
> 2. Reinstatement of the two grievants.
>
> The Union never requested back pay for the grievants as a condition of settlement regarding the Authority complying with the arbitrator's award. Under these circumstances, the Union's latter day claim for relief should be dismissed for the reasons stated herein. (Compl. at pgs. 2-4, citations omitted.)

WASA does not deny that it reinstated the grievants on or about July 24, 2006.

Consistent with Board Rule 520.7, we find that the material issues of fact and supporting documentary evidence are undisputed by the parties. As a result, the alleged violation is a question of law. Therefore, pursuant to Board Rule 520.10, this case can appropriately be decided on the pleadings. In light of the above, we grant AFGE's motion for a decision on the pleadings.

The Board has previously considered the question of whether the failure to implement an arbitrator's award or settlement agreement constitutes an unfair labor practice. In American Federation of Government Employees, Local 872, AFL-CIO v. D.C. Water and Sewer Authority, 46 DCR 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996), the Board held for the first time that "when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA." (See also, American Federation of Government Employees, Local 2725, AFL-CIO v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 , PERB Case No. 99-U-23 (1999), and American Federation of Government Employees, Local 2725, AFL-CIO v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 , PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999).

In the present case, the evidence submitted by the parties demonstrates that in the Award issued on August 16, 2005 the Arbitrator directed that WASA reinstate Cleveland Hill and Donnell Banks, without pay within ten calendar days of WASA's receipt of the award. Upon their reinstatement, the Arbitrator directed that the Grievants be treated, for all purposes, as though they had been suspended without pay, for the period of time between February 14, 2005 and August 16, 2005, the date of their ordered reinstatement. The Arbitrator indicated the period of time between the February 14, 2005 termination date, and the August 16, 2005 date of the award, meant that Hill's and Banks' suspension would be in the neighborhood of six months.

It is clear from the parties' pleadings that Banks and Hill were not reinstated within ten calendar days of the date of the August 16, 2005 Award as ordered by the Arbitrator. Instead, Banks and Hill were reinstated on July 24, 2006. To date, Banks and Hill have not been paid for the period August 26, 2005 (ten calendar days after the date of the Award) to July 24, 2006 (the date of their reinstatement). In effect, WASA converted their discipline from a an approximate six-month unpaid suspension into an almost eighteen-month (18) suspension without pay.

After reviewing the parties' pleadings and exhibits, we have determined that WASA's failure to fully comply with the terms of the Award is not based on a genuine dispute over the terms of the Award, but rather on a flat refusal to comply with the Award. Furthermore, we find that WASA has no "legitimate reason" for its on-going refusal to provide Banks and Hill with compensation for the period August 26, 2005 to July 24, 2006, a period during which the Arbitrator expected them to be back on the job. We conclude that WASA's actions constitute a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). Also, we find that by "these same acts and conduct, [WASA's'] failure to bargain in good faith with [AFGE] constitutes, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § [1-

617.04] (a)(1) (2001 ed.)." (Emphasis in original.) AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1991). Also see, Committee of Interns and Residents v. D.C. General Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1995).

Having determined that WASA has violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.), we now turn to what is the appropriate remedy in this case. AFGE is asking that the Board order WASA to: (1) cease and desist from violating the CMPA; (2) fully implement the Award and pay the Grievants back pay with interest for the period from August 26, 2005, until the date of their reinstatement on or about July 24, 2006; and (3) pay reasonable costs. (See Compl. at p. 4).

We find that WASA's failure to fully implement the Award by not reinstating Hill and Banks until July 24, 2006, has resulted in Hill and Banks suffering an adverse economic effect in violation of the CMPA. Therefore, as part of the Board's make whole remedy, WASA is ordered to pay Hill and Banks back pay for the period August 26, 2005, through July 24, 2006.

In addition, AFGE has requested that the Board award compound interest. We have previously considered the question of whether the Board can award interest as part of its "authority to 'make whole' 'those who the Board finds [have] suffered adverse economic effects in violation of . . . the Labor-Management Relations Section of the CMPA. . . '." University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 8594, Slip Op. No. 285 at p. 15, PERB Case No. 86-U-16 (1992). In the UDCFA case we stated the following:

> The D.C. Superior Court has held that an "award requiring [that]. . . employee[s] be given back pay for a specific period of time establishes . . . a liquidated debt" and therefore is subject to the provisions of D.C. Code Sec. 15-108 which provides for prejudgment interest on liquidated debts at the rate of four percent (4%) per annum. See American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department, 36 DCR 7857, PERB Case No. 88-U-25 (1989) and American Federation of State, County and Municipal Employees v. District of Columbia Bd. of Education, D.C. Superior Court. Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Wash. Law Reporter 2113 (October 15, 1986). Id at p. 17.

We have held "that prejudgment interest begins to accrue at the time the back-pay . . . became due" and shall be computed at the rate of four percent (4%) per annum. University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 41 DCR 1914, Slip Op. No. 307 at p. 2, PERB Case No. 86-U-16 (1992). See also, Fraternal Order of Police/MPD Labor Committee v. District of Columbia Metropolitan Police Department, 37 DCR 2704, Slip Op. No. 242, PERB Case No. 89-U-07 (1990).

WASA was required to reinstate Hill and Banks within ten calendar days of the August 16, 2005 Award. WASA did not reinstate Hill and Banks until July 24, 2006. WASA is ordered to pay Hill and Banks back pay with compound interest at the rate of four percent (4%) per annum.

As to AFGE's request for reasonable costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs.

In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, this Board has been reluctant to award costs. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999), and American Federation of Government Employees, Local 2725 v. D.C. Department of Health, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, we have awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. See, AFGE Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1991).

In the present case, AFGE does not assert or provide evidence that WASA has engaged in a pattern and practice of refusing to implement arbitration awards or negotiated settlements. We therefore find that it would not be in the interest of justice to accord AFGE its requested reasonable costs in these proceedings for prosecuting WASA's violation. In light of the above, we deny AFGE's request for reasonable costs.

"We recognize that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices, is the protection of rights and obligations." National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). In light of the above, we are requiring that WASA post a notice to all employees concerning the violations found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected. By requiring that WASA post a notice, "bargaining unit employees . . . would know that [WASA] has been directed to comply with their bargaining obligations under the CMPA." Id. at p. 16. "Also, a notice posting requirement serves as a strong warning against future violations." Wendell Cunningham v. FOP/MPD Labor Committee, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 872's, ("AFGE") Motion for a Decision on the Pleadings, is granted.

2. The District of Columbia Water and Sewer Authority's ("WASA"), Motion to Dismiss is denied.

3. WASA, its agents and representatives shall cease and desist from refusing to bargain in good faith with AFGE by failing to fully comply with the terms of the August 16, 2005 Arbitration Award.

4. WASA, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII. Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.

5. WASA shall within fourteen (14) days from the issuance of this Decision and Order fully implement the terms of the Arbitration Award by providing Donnell Banks and Cleveland Hill with back pay retroactive for the period August 26, 2005 through July 24, 2006, with interest at the rate of four percent (4%) per annum. The interest in this case shall begin to accrue at the time Hill and Banks were ordered reinstated, namely August 26, 2005.

6. AFGE's request for reasonable costs is denied for the reasons stated in this Slip Opinion.

7. WASA shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.

8. Within fourteen (14) days from the issuance of this Decision and Order, WASA shall notify the Public Employees Relations Board (Board), in writing, that the Notice has been posted accordingly. Also, WASA shall notify the Board of the steps it has taken to comply with paragraph 5 of this Order.

10. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D. C.

December 20, 2006

DISTRICT OF COLUMBIA REGISTER

MAR 3 0 2007

PERB Public Employee Relations Board

Government of the District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 858, PERB CASE NO. 07-U-02 (December 20, 2006)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 858.

WE WILL cease and desist from refusing to bargain in good faith with the American Federation of Government Employees (AFGE), Local 872, AFL-CIO by failing to comply with the terms of an arbitration award over which no genuine dispute exists over the terms.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Water and Sewer Authority

Date: _____

By: _____
General Manager

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have may questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

MAR 3 0 2007

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 383, AFL-CIO, Complainant,	PERB Case No. 07-U-03 Opinion No. 859
v.	**FOR PUBLICATION**
District of Columbia Mental Retardation Retardation and Developmental Disabilities Administration, Respondent.	

ORDER

The Board has decided to issue its Order now. A decision will follow. The Board having considered the American Federation of Government Employees, Local 383's Motion for Preliminary Relief, hereby denies the motion. In addition, this case is referred to a Hearing Examiner for the purpose of developing a full and factual record upon which the board may make a decision.

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 383's Motion for Preliminary Relief, is denied.

2. This case is referred to a Hearing Examiner.

3. Pursuant to Board Rule 559.1, this Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 20, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 383, AFL-CIO,	PERB Case No. 07-U-03
Complainant,	Opinion No. 859
v.	MOTION FOR PRELIMINARY RELIEF
District of Columbia Mental Retardation and Developmental Disabilities Administration,	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER[1]

I. Statement of the Case

The American Federation of Government Employees ("Complainant" or "Union"), filed an Unfair Labor Practice Complaint ("Complaint") and Motion for Preliminary Relief ("Motion") on October 6, 2006. The Complainant alleges that the District of Columbia Mental Retardation and Developmental Disabilities Administration ("Respondent" or "MRDDA"), violated D.C. Code § 1-617.04(a)(1) and (5) by implementing a new parking policy without negotiating with the Union. (Motion at pgs. 1-2). The Complainant requests that the Board grant preliminary relief by ordering the MRDDA to: (1) maintain the status quo and halt its move to the new office location at 1125 15th Street, N.W.; or, (2) immediately provide free parking spaces to approximately 80 individuals; and (3) fulfill its bargaining obligation with the Union while the Board determines whether additional relief is warranted. (Motion at p. 12).

[1]On December 20, 2006, the Board issued an Order denying the Complainant's Motion. The December 20th Order indicated that a decision would be issued at a later date. That Order is attached to this decision.

The Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the unfair labor practice allegations. In addition, the Respondent filed a document styled "Response to Complainant's Motion for Preliminary Relief" ("Opposition") claiming that this matter is moot because: (1) the Respondent has already provided 70 parking spaces; (2) the Board can fashion a monetary remedy if the MRDDA has incurred any liability; and (3) there is a dispute regarding a material fact. (Opposition at pgs. 2-3). Therefore, the MRDDA is requesting that the Motion be denied.

The Complaint's Motion and the Respondent's Opposition are before the Board for disposition.

II. Discussion

The MRDDA was scheduled to relocate to 1125 - 15th Street, NW on October 10, 2006. The Union claims that on October 4, 2006, the MRDDA informed Union representatives that the new building had a parking garage with 101 available spots and the MRDDA intended to offer 60 parking spaces to be shared by the MRDDA union and non-union staff. The 60 spaces would be shared by employees who would take turns using the same space on alternate days. Twenty-five spaces would be reserved for management. (Motion at p. 6). The Union asserts that the parking garages near the new location are cost prohibitive for the bargaining unit members and do not allow patrons to exit and enter without paying again for parking. Also, the affected employees must use their vehicles on a daily basis to visit clients who are mentally retarded or developmentally disabled and "these employees may not be able to fully serve MRDDA's vulnerable public clientele." (Motion at p. 2).

Article 12, Section E of the parties' collective bargaining agreement provides that "[e]mployees required as a condition of employment to use their personal vehicle in the performance of their official duties may be provided a parking space or shall be reimbursed for non-commuter parking expenses, which are incurred in the performance of their official duties." The Union claimed that for the past 20 years, the MRDDA has provided parking spaces for employees who are required to use their vehicles as a condition of employment. Therefore, the Union argued that management must bargain over the new parking plan and requested bargaining.

The Union asserts that in response to its bargaining request, the MRDDA stated that the plan to share spaces was to be implemented, but later stated that this was merely a bargaining offer concerning the parking issue. On October 5th, 2006, as a temporary solution, the Union made a counterproposal that the MRDDA provide 80 of the 101 total parking spaces to those members of the bargaining unit who are required to use their personal vehicle to perform their duties. The Union claims that on October 5, 2006, management sent an e-mail offering 60 shared spaces for non-management employees, but never responded to the specific counterproposal made by the Union.

In light of the above, on October 6, 2006, the Union filed an unfair labor practice complaint and a motion for preliminary relief in this matter. (Opposition at pgs. 6-8). Specifically, the Union states that by relocating and failing to provide free parking at the new location for all of its employees who are required to use their vehicles to perform their official duties - the MRDDA is violating D.C. Code § 1-617.04(a)(1) and (5). As a basis for its Motion, the Union asserts that: (1) many employees had not received parking passes prior to reporting to work on October 10, at the time of the filing of the Motion; (2) bargaining unit employees must make home visits and respond to emergencies; (3) the Union "fears that it will be physically impossible for the bargaining unit members to get a week's worth of visits crammed into two or three days a week (Motion at p. 9); and (4) public parking garages in the area are cost prohibitive for the bargaining unit members and do not allow patrons to exit and enter without paying again for parking. (Motion at pgs. 8-9).

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

> The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. *See AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330 at p. 4, n. 1, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in *Automobile Workers v. NLRB*, 449 F.2d 1046 at 1051 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where the Board has determined that the standard for exercising its discretion has been met, the bases for such relief were restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, et al. V. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

The Respondent contends that the Motion should be denied because the Union has failed to meet the requirements for preliminary relief. In support of this claim, the Respondent asserts that: (1) the Board's processes have not been frustrated because "the Board can calculate the

amount of past harm as money damages . . . after the [unfair labor practice] proceedings have been concluded"; (2) the alleged violation is not widespread or flagrant; and (3) there are material facts in dispute. (Opposition at p. 3).

The Respondent also contends that preliminary relief has been rendered moot by events which have taken place after the filing of the Complaint. Specifically, the Respondent asserts that it made available 70 non-shared parking spaces to bargaining unit members, thus substantially complying with the Union's request for 80 spaces. The Respondent asserts that the parties merely disagree as to the number of spaces needed.

The Complainant's claim that the Respondent's actions meet the criteria of Board Rule 520.15, is a repetition of the allegations contained in the Complaint. (See Compl. pgs. 5-6). Even if the Complaint is ultimately found to be valid, it does not appear that any of the Respondent's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. The Respondent's alleged actions presumably stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the Comprehensive Merit Personnel Act (CMPA) asserts that "the District, its agents, and representatives are prohibited from interfering, restraining or coercing any employee in the exercise of the rights guaranteed by [the CMPA],"[2] the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Complainant has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

Under the facts of this case, the alleged violations and their impact do not satisfy any of the criteria prescribed by Board Rule 520.15. Specifically, we conclude that the Union has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Union following a full hearing. Therefore, we find that the facts presented do not appear appropriate for the granting of preliminary relief. Furthermore, the parties dispute whether: (1) the MRDDA bargained with the Union; (2) the MRDDA provided parking spaces to the bargaining unit; and (3) how many employees are entitled to a parking space. Therefore, a hearing is warranted in order to resolve these facts. In view of the above, we deny the Union's Motion for Preliminary Relief.

[2]D.C. Code § 1-617.04(a)(1) (2001).

For the reasons stated above, the Board denies the Complainant's request for preliminary relief and directs the development of a factual record through an unfair labor practice hearing.[1]

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 11, 2007

[1] See Decision and Order dated December 20, 2006, denying the Complainant's Motion, attached.

Government of the District of Colum...
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Petitioner,	
and	PERB Case No. 04-A-03
	Opinion No. 860
District of Columbia Metropolitan Police Department,	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union") filed an Arbitration Review Request ("Request"). The Union seeks review of an Arbitration Award ("Award") that denied the grievance filed by the Union. The District of Columbia Metropolitan Police Department ("MPD") opposes the Request.

The issue before the Board is whether "the arbitrator was without authority or exceeded his or her jurisdiction." D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion

In 2002 and 2003, Chief of Police Ramsey ("Chief") declared three emergencies existed within the District of Columbia. (See Award at p. 2). Due to these declared emergencies, the Chief made changes to the work schedule of bargaining group members. Group and class grievances were filed by the union members affected by the work schedule changes alleging violations of the Collective Bargaining Agreement ("CBA"), Articles 4, Management Rights, and 24, Scheduling, and D.C. Code §§ 1- 612.01, Hours of Work, and 1 -617 08, Management Rights. (See Award at p. 3). Specifically,

these group grievances alleged that MPD's exercise of its management rights can only occur "in accordance with applicable laws, rules and regulations"[1] and that the D.C. Code requires that "[t]he working hours in each day in tle basic work week are the samd' and that days off be consecutive.[2] Consequently, the Union argued that when M PD assigned the grievants to tours of duty which varied from their regularly assigned schedules MPD violated the CBA by violating the D.C. Code.

The parties were unable to resolve the grievances. Therefore, the Union invoked arbitration. (See Award at p. 3).

At arbitration, the Union argued that only the Mayor may suspend the requirements of § 1-612.01(b). The Union claims that pursuant to D.C. Code § 1-612.01(b), absent a declaration by the Mayor, the Chief is prohibited from assigning members to varying tours of duty or non-consecutive days off without giving one week's advance notice. It was undisputed that no declaration of an emergency was made by the Mayor. The Union acknowledges that the Chief may declare an emergency situation and suspend the provisions of the CBA which require 14 days advance notice prior to making changes in an employee's tour of duty.[3] (See Award at p. l4). However, pursuant to D.C. Code § 1-612.01(b)(l), MPD must still provide one week's notice. Under the circumstances, the Union argued that MPD violated the CBA and the D.C. Code when it assigned the grievants to varying tours of duty within the same work week and to non-consecutive days off, and by not providing the statutorily required one week notice prior to the changes in their work schedules. In view of the above, FOP argued that MPD failed to exercise its management rights in accordance with applicable law, violating the CBA.

The Union requested as a remedy for violation of the CBA "compensation of time and one-half pay as a penalty. In support of this request the Union cited *Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Dolan, et al.) and Metropolitan Police Department*, AAA Case No. 16 39 00248 93 (Jules O. Pagano, April 5, 1994). In that case, the Arbitrator awarded time and one-half pay because he found that MPD had violated C BA Articles 4 and 24, when the Chief, absent a declaration of emergency by the Mayor, assigned Training Division officers to two different tours of duty within one work week.

MPD countered that the management rights provisions of D.C. Code § l-617.08 "trump[s] the everyday rules and expectations contained in D.C. Code § 1-612.01." (Award at p. 15). In addition, MPD claimed that under the emergency circumstances which are the subject of these

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[1] CBA Article 4.

[2] D.C. Code § 1-612.01(3).

[3] CBA Article 24, Section 1.

grievances, neither the law nor the CBA provide for the Union's requested remedy. MPD also contended that the "cannons of statutory construction and contract interpretation establish that the specific language, concerning the Chief's right to take whatever action is necessary in an emergency, renders conflicting language inoperative." (Award at p. 16). Moreover, MPD asserted that because these grievances involve a clear management right, that the grievances are not arbitrable. Lastly, MPD maintained that the *Dolan* case is not applicable, because no declaration of an emergency was made.

The Arbitrator accepted into evidence a document, Mayor's Order 2000-83, first submitted to him in a reply brief from MPD. He then relied on that document to rule against the Union in an Award issued on November 5, 2003. The Union chose not to raise any issue to the Arbitrator concerning his admission into evidence of the Mayor's Order.

In his Award, Arbitrator Sean J. Rogers found that the grievances were arbitrable, because the management rights provisions of the CBA, "are not unbridled", and must be exercised in accordance with applicable laws, rules and regulations. (See Award at p. 16). The Arbitrator determined that the Mayor's emergency declaration powers did not reside solely with the Mayor because of his issuance of Mayor's Order 2000-83.

In their Request, the Union argues that the introduction of the Mayor's Order in the Reply Brief presented by MPD resulted in the Arbitrator exceeding his jurisdiction and being without authority to render his Award. MPD filed an Opposition to the Request, asserting that the Arbitrator was within his authority to request and rely on the Mayor's Order.

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without authority, or exceeded, his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

In the present case, the Union asserts that the Arbitrator was without authority or exceeded his jurisdiction by relying on the Mayor's Order 2000-83, for the proposition that the Mayor had delegated authority to the Chief of Police regarding the suspension of the notice requirements. In support of this argument, the Union contends that under Article 19, Section 5 of the CBA, that "the parties to the grievance or appeal shall not be permitted to assert in such arbitration proceedings any ground or to rely on any evidence not previously disclosed to the other party." (See Request at p. 4). The Union argues that because the Arbitrator did not enforce this contract provision precluding MPD from presenting the Mayor's Order, he has exceeded his jurisdiction and was without authority

to render his Award dismissing the grievances.

We have held that "[i]ssues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee,* 39 DCR 6232, Slip Op. No. 282 at p. 4, n. 5, PERB Case No. 87-A-04 (1991). Here, the Union made no objection to the admission of the Mayor's Order before the Arbitrator, but now raises that objection before the Board. Had the Union not had the opportunity to object to admission of that document prior to the Arbitrator's ruling, we might reach a different result. However, in asking for reply briefs to "aid me in my adjudication of the grievance", the Arbitrator expressly stated: "I invite the parties to reply on any issues raised in the others' submissions.) (Respondent's Opposition, Attachment 1). Consequently, the Board finds that this argument does not present a statutory basis for review. As a result, the Board cannot reverse the Award on this ground

In addition, the Union asserts that the Arbitrator's interpretation and application of Article 19 of the CBA failed to disallow the submission of the Mayor's Order in a reply brief. We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court...to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract. *Misco, Inc.*, 484 U.S. at 38. Also, we have explained that:

> [by] submitting a matter to arbitration the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

Here, the Board finds that the Union is merely disagreeing with the Arbitrator's interpretation and application of the provisions of the CBA. As stated above, disagreement with the Arbitrator's interpretation of the parties' CBA is not grounds for reversing the Arbitrator's Award. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. 01 MPA 18 (September 17, 2002). Thus, the Board finds that the Union's claim does

not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

In view of the above, we find that FOP has not met the requirements for reversing Arbitrator Rogers' Award. In addition, we find that the Arbitrator's conclusions are supported by the record. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Review Request is denied.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 4, 2007.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.04-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 4th day of January 2007.

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Sheryl V. Harrington
Secretary

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	PERB Case No. 06-A-02
and	Opinion No. 861
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Jay Hang),	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, which rescinded the termination of Jay Hang ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction...." D.C. Code §1-605.02(6) (2001 ed).

II. Discussion

On the evening of December 1, 2001, the Grievant was off duty and was performing private work at the Insomnia Club located on 6th Street, N.W., Washington, D.C. His private work at the Insomnia Club ("Club") had not been authorized by MPD. He was not wearing his uniform.

MPD prohibits members of the police force from engaging in outside employment unless authorized by the Chief of Police and from "being employed (in any capacity) by an ABC establishment, where the primary purpose is the sale of alcoholic beverages." (Award at p. 2).

Sometime during the course of his work, the Grievant consumed alcoholic beverages. At around 2 a.m., the Grievant and a second officer (Officer Le), who was on duty and in uniform were standing near the door of the Club when they heard a noise that was either a popping sound or gunshots. Officer Le ran in the direction of the noise. The Grievant also began to run in the direction of the apparent gunshots; however, the Grievant was uncomfortable with the pursuit because he was intoxicated and did not want to become involved in a situation in which he might need to discharge his service weapon. (See Award at p. 2). As a result, the Grievant returned to the Club.

"[W]hen Officer Le reached the corner of 6th and G Street, N.W., he was confronted by a gunman walking toward him. The gunman attempted to conceal his weapon. Officer Le identified himself and ordered the subject to drop his weapon. The subject opened fire on Officer Le. A foot chase ensued. At some point, Officer Le spotted the marked police units and enlisted their assistance. The subject ultimately was apprehended and weapons were recovered from the scene. (See Award at p. 2)

In light of the above, on July 19, 2004, MPD served the Grievant with a Notice of Proposed Adverse Action proposing the Grievant's termination. The Notice cited the Grievant's "failure to obey orders or directives, being under the influence of alcohol, and neglect of duty. " (Award at p. 3) On July 20, 2004, the Grievant responded to the Notice and requested that a Trial Board be convened.

The Trial Board recommended the Grievant's termination. By memorandum dated September 24, 2004, Assistant Chief Shannon Cockett (Director of Human Resources) confirmed the Trial Board's findings and ordered the Grievant's removal from MPD. The Grievant's removal was to become effective on December 29, 2004. The Grievant appealed the decision by invoking arbitration pursuant to Article 20, Section E of the parties' CBA. (See Award at p. 5)

At arbitration FOP argued that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed his request for a Trial Board. Article 12, Section 6 of the parties' CBA provides in pertinent part, that an employee "shall be given a written decision and the reasons therefore no later than ... 55 days after the date the employee is notified in writing of the charges or the date the employee elects to

have a departmental hearing." (Award at p. 6.). FOP stated that in this case the "Grievant requested a [T]rial [B]oard hearing on July 20, 2004, and MPD issued its final decision ordering the Grievant's termination on September 24, 2004 - - 66 days later. (Award at p. 7).

FOP argued that "the violation of the 55-day rule [was] sufficient by itself to negate the termination order without considering the merits of . . .[MPD's] decision." (Award at p. 7). The FOP argued that the Grievant should be reinstated.

MPD acknowledged that its final decision was issued more than 55 days after the date the Grievant elected to have a hearing before a Trial Board. However, MPD argued that the violation of the 55-day rule constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. In support of its position, MPD cited Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (2002). Also, MPD asserted that termination was appropriate in light of the serious infractions admitted by the Grievant.

In an Award issued on December 27, 2004, the Arbitrator rejected MPD's argument by noting the following:

> Article 12 Section 6 of the collective bargaining agreement provides that an "employee shall be given a written decision [whether discipline will be imposed] and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable . . .." This time frame may be extended if (a) the employee seeks a postponement or continuance of the trial board hearing, (b) the employee requests an extension of time for answering the Department's notice of proposed discipline, or (c) either party requests an automatic 30-day extension of the 55-day time limit.
>
> The Department concedes it did not issue its final decision terminating Grievant within the 55-day time limit. Instead, 66 days passed between Grievant's July 20, 2004, letter requesting a hearing before a trial board and the Assistant Chief's Final Notice of Adverse Action issued September 27. There is no indication Grievant requested any postponements of the time schedule prescribed by the collective bargaining agreement, nor apparently did the Department request an "automatic" 30 day extension.
>
> The Department argues its failure to meet the 55-day deadline constituted "harmless error." In support of this position, the Department's analogizes the instant dispute to a case decided by the Superior Court, *Metropolitan Police Dep't v. D.C. PERB*, 01-MPA-19 (2002). The underlying issue in that case was a violation

> of the 15-day rule found at Article 12 Section 7 of the labor agreement.
>
> This Arbitrator does not find the Department's analysis relying on Superior Court No. 01-MA-19 to be persuasive. The 55-day rule at issue in this case differs in critical respects from the 15-day rule considered by the Superior Court in 01-MPA-19. The 55-day rule includes provisions extending the deadline for a final decision by the Department, but only in situations in which a *grievant* has caused the delay (or in the event either party has asked for an automatic 30-day extension). Thus under the 55-day rule, when a *grievant* has requested a delay in the discipline proceedings, the *Department* is given additional time for issuing its final notice of adverse action. In contrast, the 15-day rule provision implicitly allows for a tolling of the procedural time frame when the *Department* decides it needs additional time; however, the benefit of the delay goes to the *grievant*. In this Arbitrator's view, the comparison advocated by the Department is a poor fit.
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> * * *
>
> Although this Arbitrator does not view himself in this case as strictly bound by the analysis and conclusions of prior arbitrators who have interpreted the 55-day rule, their decisions are influential both for their persuasive value and because they inform the parties' expectations of their respective obligations under the collective bargaining agreement. If the analysis in these earlier 55-day rule cases was clearly wrong, this Arbitrator would not hesitate to disagree and reach a different conclusion. However, where (as here) the analysis of the disputed contract language is reasonable and has been affirmed repeatedly by arbitrators, the PERB and the Superior Court, I am persuaded it is right and sensible to follow established precedent. Consistent with prior arbitrators on this issue, I conclude that the Department's violation of the 55-day rule denied Grievant of his substantive rights under the collective bargaining agreement and therefore his discharge shall be reversed. (Award at pgs. 8-10).

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and 55-day rule. In both instances the cases were before the Superior Court on review of arbitration

decisions that reversed the discipline imposed by MPD due to missed contractual time limits: In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the 55-day rule. . ." (Request at p. 4). MPD "submits . . . that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz." Id.

In addition, MPD contends that the Grievant was not prejudiced by the alleged 55-day rule violation. In fact, it contends he benefitted by the delay because he was able to remain on the MPD payroll for an additional period of time awaiting the decision of his adverse action hearing. (See Request at p. 7). Furthermore, MPD suggests that there is nothing in the instant record that would show that the Grievant's rights were impaired by MPD issuing a decision in violation of the 55-day rule. Accordingly, MPD argues that the rule of harmless error should apply and the Arbitrator's decision to rescind the termination should be set aside. (See Request at p. 7).

MPD notes that it should not be ignored that the Grievant was found guilty of committing serious acts of misconduct, and that determination has not been contested or otherwise challenged. Also, MPD claims that if the Grievant is reinstated, the nature of his misdeeds makes it is unlikely that he would be returned to full-duty status. Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual unsuitable to serve as a police officer. Clearly such a remedy would violate public policy. (See Request at p. 7).

MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

MPD suggests that the plain language of Article 12, Section 6 of the CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See, Request at pgs. 4-5).

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See, MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez, Slip Op. No. 814, PERB Case No. 05-A-02 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002),

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

We find no merit to either of MPD's arguments. Also, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 3, 2007

affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (DC Cir. 2006). In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement. [1] See, District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Greenburg did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Greenburg acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (Request at p. 2). For the reasons discussed below, we disagree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F. 2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

MPD argues that the Award in this case violates the "harmless error" rule specified in D.C. Code 2-510(b), case law interpreting the Civil Service Reform Act, and the Civil Service Reform Act itself. (Request at p. 6-7). We have previously considered and rejected this argument by stating that:

> MPD relies on D.C. Code 2-510(b) which permits a reviewing court to apply the "prejudicial error" rule. D. C. Code §2-510(b)(2001 ed.). However, the Arbitrator's Award does not compel the violation of this section of the D.C. Code. MPD's cited section is outside the Comprehensive Merit Personnel Act

[1] We note that if the Petitioner had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

> ("CMPA") which governs this case. The Board's jurisdiction and review of arbitration awards is limited by the CMPA. The CMPA itself has no provision requiring or permitting this Board to apply the "prejudicial error" rule." See, D.C. Code §1-601(2001 ed.) et seq. As such, the Award does not violate D.C. Code 2-510(b) or the CMPA which does not contain a "prejudicial error rule."

In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (DC Cir 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error rule" by stating the following:

> The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from Cornelius demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787.[2]

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[2]The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the CBA is directory, rather than mandatory.

MAR 3 0 2007

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE

NOTICE OF WARD 8 EDUCATIONAL WORKSHOP

The Department of Consumer and Regulatory Affairs' Office of the Tenant Advocate will present an educational workshop in Ward 8 to assist residents in learning about their tenant rights. The workshop will be held on Saturday, March 24, 2007 from 10:00 a.m. until 3:00 p.m. at Ballou Senior High School, 3401 4th Street, SE.

The workshop will include sessions on the Rental Reform Amendment Act of 2006, Ins and Outs of Residential Housing inspections, Completing a Tenant Petition, Understanding Your First Right of Refusal (The Opportunity to Purchase Act), Understanding the Condo Conversion Process and How to Deal With and Treat Rats, Mice, Roaches and Bedbugs.

The workshop is free and open to the public. For more information and for individuals with special needs contact the Office of the Tenant Advocate at 202/442-8359.

CALENDAR YEAR 2007 WORKSHOPS

Ward 8 March 24, 2007
Ward 1 April 14, 2007
Ward 7 May 5, 2007
Ward 2 June 2, 2007
Ward 3 June 16, 2007
Ward 6 September 8, 2007
Ward 5 October 6, 2007
Ward 4 November 3, 2007

For more information, please contact:

Ms. Delores Anderson
Office of the Tenant Advocate
Department of Consumer and Regulatory Affairs
941 North Capitol St., NE, Suite 9500
Washington, DC 20002
delores.anderson@dc.gov
202-442-8359

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17364-A of CIH/VMS Restorations LLC, pursuant to 11 DCMR §3104.1, for a special exception to allow the construction of five (5) single-family row dwellings and two (2) single-family semi-detached dwellings under Section 353, and pursuant to 11 DCMR §3103.2, for a variance to allow one parking space in the front yard of each dwelling under subsection 2116.2, in the R-5-A District at premises 2300 block of Skyland Terrace, S.E. (Square 5740, Lot 852).

HEARING DATE:	October 11, 2005	
DECISION DATE:	October 11, 2005	(Bench Decision)
MODIFICATION DECISION DATE:	February 27, 2007	

SUMMARY ORDER ON REQUEST FOR MINOR MODIFICATION/CLARIFICATION OF APPROVED PLANS[1]

SELF-CERTIFIED

The zoning relief requested in this case was self-certified pursuant to 11 DCMR §3113.2.

BACKGROUND

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission ("ANC") 8B and to owners within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 8B, which is automatically a party to this application. ANC 8B did not participate in the hearing. The Office of Planning (OP) submitted a report in support of the application.

By Summary Order dated October 11, 2005, the Board approved Application No. 17364, of CIH/VMS Restorations LLC ("Applicant"), including the Site Plan and other plans submitted with that application.

THE WAIVER REQUEST

As part of its modification/clarification filing, the Applicant requested a waiver from the six-month limitation for filing requests for modification of plans with the Board, as set

[1] This Order is an addendum to Board of Zoning Adjustment Order No. 17364. All provisions of Order No. 17364 remain in effect except as specifically modified/clarified herein.

forth in §3129.3 of the Zoning Regulations. The Board granted the waiver of the filing requirement to consider the requested modification/clarification, finding good cause and no prejudice to any party. OP and ANC 8B did not submit any comments to the Board on the modification and waiver requests.

REQUEST FOR MINOR MODIFICATION/CLARIFICATION OF APPROVED PLANS

By letter dated February 16, 2007, the Applicant requested the Board to modify/clarify for the Zoning Administrator that the Board's Order and approved plans establish the applicable lot width and lot area requirements, including street frontage, in full compliance with the applicable Zoning Regulations. The Applicant, in accordance with the Board's approval, submitted to the Zoning Administrator a Subdivision Plat establishing the seven dwelling unit lots and "out parcel" lot. The Zoning Administrator, on or about February 12, 2007, determined that the "out parcel" Lot and Lots 1 and 2 shown on the approved Site Plan, BZA Exhibit 9-B, did not comply with the minimum street frontage requirements under 11 DCMR §401.6. As a result, the Zoning Administrator refused to approve the Subdivision Plat and informed the Applicant that a variance from §401.6 was required from the Board.

As a preliminary matter, the Board determined that the Applicant had complied with the ten (10) day notice and comment period required under 11 DCMR §3129.4. The Applicant's request for modification/clarification was served on the Chairperson of the ANC 8B and the Single Member District Commissioner 8B01 by hand-delivery on February 16, 2007 and all other parties, including the Office of Planning, were served electronically on the same day. As a result, the ten (10) day period began to run on February 17, 2007 (without the addition of three (3) additional days for mail service) and expired on Monday, February 26, 2007 (not an official holiday or weekend). Following expiration of the ten (10) day notice and comment period, the Board was authorized to take action on the requested modification/clarification.

The requested minor modification/ clarification makes no change to the approved plans and does not involve any change in the material facts relied upon by the Board in its approval. Based on the record, the Board determined that the proposed Subdivision Plat complies fully with the approval granted and the approved Site Plan in BZA Exhibit 9-B, including the applicable street frontage requirements established by the Board.

As part of the review of this application under §353, the Board specifically approved the Site Plan fully understanding that the Applicant intended and would be required to Subdivide the site into eight (8) lots. Under §401.3, the Board is required to establish the applicable minimum lot area and lot width, including street frontage. From the record, including the Office of Planning's report in support of the Application which specifically referenced the "layout of lots 1-3 and the limited street width and shared access" driveway and related easements, the Board established the applicable lot area, lot width and street

frontage requirements. As a practical matter, it would have been difficult for the Board to establish the required lot area and lot width without at the same time setting the required street frontage. In this case, §401.6 is not applicable and the proposed Subdivision Plat complies with the Board's order and all the applicable Zoning Regulations, including street frontage. Approval of the Subdivision Plat by the Zoning Administrator does not require any additional zoning relief.

Pursuant to 11 DCMR §3101.6 and 3129.1, the Board has determined to waive the requirement of 11 DCMR §3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. **It is therefore ORDERED that the MODIFICATION/CLARIFICATION of APPROVED PLANS (Exhibit 33 in the record) be GRANTED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to approve; John G. Parsons to approve by absentee ballot)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this Order.

FINAL DATE OF ORDER: MAR 15 2007

UNDER 11 DCMR §3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR §3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR §3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR. STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17569 of Marriott International Inc., on behalf of Team Eckington LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the off-street parking requirements under subsection 2101.1, a special exception from the roof structure requirements under section 411, and a special exception from the rear yard requirements under subsections 774.2 and 774.9(c), to allow the construction of a hotel in the C-3-C District at premises 201 Florida Avenue, N.E. (Square E-710, Lot 801).

HEARING DATE: February 27, 2007
DECISION DATE: February 27, 2007 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6C and to owners of property within 200 feet of the site.

The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application. ANC 6C submitted two letters in support of this application marked as Exhibit No. 24 and Exhibit No. 29 of the record of this case. The Department of Housing and Community Development ("DHCD"), the Office of Planning ("OP"), and the District Department of Transportation ("DDOT") submitted reports in support of the application, marked as Exhibit Nos. 32, 33 and 34 respectively, in the record of this case. The Near Northeast Citizens Against Crime & Drugs, which was accepted by the Board as a party in support of the application, also submitted two letters in support of the application, marked as Exhibit No. 28 and Exhibit No. 30.

ANC 6A and DDOT's support for the application were premised on Applicant's commitments to implement specific transportation management and parking measures as reflected in Exhibit 27 (Applicant's letter dated December 22, 2006), Exhibit 29 (ANC Report), Exhibit 33 (OP Report), and Exhibit 34 (DDOT Report) of this record. The Applicant reaffirmed at the hearing its commitment to implement these measures as well as additional transportation measures recommended by DDOT in its report. Applicant did not agree to implement DDOT's recommendation that Applicant provide two parking spaces, at no cost, for car-sharing vehicles, stating at the hearing that this recommendation raised security, operational and practical concerns.

While the Board recognizes the benefit of car-sharing in decreasing the need for parking spaces in general, based on the testimony of the Applicant at the hearing, the Board determined that allocating parking spaces for car-sharing in this case was neither practical nor appropriate.

Following are the commitments that Applicant agreed to implement:

1. Provide, administer, and encourage participation in a sustainable Employee Commuter's Incentive Program which will include the following elements:

    a) Tax-free purchase of Metrocheck, SmarTrip, and CommuterBucks through WageWorks or a similar provider;
    b) Van-pool matching service, free to employees;
    c) Car-pool matching service, free to employees; and
    d) Safe and secure bicycle parking, free to employees.

2. Establish an Employee Parking Policy and Registration Program that informs employees where they can and cannot park, i.e., no parking on residential neighborhood streets including Second Street and areas between M and K Streets.

3. Routinely request that the District's Department of Transportation or other appropriate District agency enforce parking restrictions in the immediate neighborhoods surrounding the hotel, including Second Street and areas between M and K Streets.

4. Designate a Marriott Courtyard staff member as a community liaison, available to address specific ANC 6C concerns, needs, or grievances.

5. Provide commuter-related information to both guests and employees at a lobby-located stand-alone kiosk.

6. Make available to employees and guests, through local parking management companies, additional parking on an as-needed basis.

7. Marriot Courtyard is currently in the design phase of developing with DDOT on Second Street a designated drop-off and pick-up passenger waiting area at the main entrance to the hotel with appropriate signage for use by guests and employees.

8. Provide website hotlinks to CommuterConnections.com and goDCgo.com on developer and property management websites.

9. Provide an on-site business center to residents with access to copier, fax, and Internet services.

10. Designate a member of building management as a point of contact who is responsible for coordinating and implementing TDM obligations. (It would make sense that this be the same person who acts as the community liaison proposed in the Applicant's Employee Parking Plan).

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to 11 DCMR §§ 3103.2 and 3104.1 for a variance from the off-street parking requirements under subsection 2101.1, a special exception from the roof structure requirements under section 411, and a special exception from the rear yard requirements under subsections 774.2 and 774.9(c). No parties appeared at the public hearing in opposition of this application. The Board finds that based on the evidence in the record, and specifically the commitments made by the Applicant as set forth above, a decision by this Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 411, 774.2 and 774.9(c), that the requested relief can be granted, being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

The Board further concludes that the applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for relief from 11 DCMR § 2101.1 since there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3 that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that the application is **GRANTED.**

VOTE: **4-0-1** (Curtis L. Etherly, Jr., John A. Mann II, Ruthanne G. Miller and Geoffrey H. Griffis, to approve; no Zoning Commission Member participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

FINAL DATE OF ORDER: MAR 19 2007

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

MAR 3 0 2007

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17579 of Keith Catanzano, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 403, to allow the construction of an accessory structure serving a single-family row dwelling in the R-4 District at premises 1235 Independence Avenue, S.E. (Square 1015, Lot 144).

Note: The Board amended this self-certified application at the public hearing changing the originally sought special exception relief under section 223, to variance relief from the lot occupancy requirements under section 403.

HEARING DATE: March 20, 2007
DECISION DATE: March 20, 2007 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6B, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 6B. The ANC submitted a letter is support of the application. The ANC letter supported the publicly noticed relief for a special exception. However, in public testimony it was revealed that at the ANC meeting, the ANC also discussed the relief for the area variance. The OP submitted a report in opposition to the application. The Capitol Hill Restoration Society submitted a letter in support of the application.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2 and 403. The Board agreed with the OP that the application should be heard under the area variance test and not under the special exception provisions of section 223. The Board disagreed with OP's conclusion that the Application does not meet the test for a variance. The Board, in brief, found that the Applicant proved the practical difficulty test. The Board based its conclusion, in part, on the dwelling's absence of a basement level that creates a unique circumstance specific to this property compared to neighboring properties.

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2 and 403, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application (pursuant to Exhibit 10 – Architectural Plans) be **GRANTED.**

VOTE: **3-0-2** (Curtis L. Etherly, Jr., Michael G. Turnbull and John A. Mann II to Approve, Geoffrey H. Griffis and Ruthanne G. Miller not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

FINAL DATE OF ORDER: MAR 21 2007

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

MAR 3 0 2007

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17600 of Dakota Square LLC, pursuant to 11 DCMR § 3102.2, for a variance from the loading berth requirements under subsection 2201.1, to allow the construction of a mix-use (commercial/residential) building in the C-2-A District at premises 300-320 Riggs Road, N.E. (Square 3748, Lot 52).

HEARING DATE: March 20, 2007
DECISION DATE: March 20, 2007 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 4B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 4B, which is automatically a party to this application. ANC 4B submitted a report in support of the application. The Office of Planning (OP) also submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3102.2, for a variance from § 2201.1. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and the Office of Planning reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, *(2201.1)* that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: **3-0-2** (Curtis L. Etherly, Jr., John A. Mann II and Michael G. Turnbull to grant; Geoffrey H. Griffis and Ruthanne G. Miller not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: MAR 21 2007

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE

OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

TWR

ZONING COMMISSION NOTICE OF FILING
Z.C. Case No. 07-07
(Consolidated PUD – Square 441, Lots 21, 66, 97, 814, 815, and 854)
March 20, 2007

THIS CASE IS OF INTEREST TO ANC 1B

On March 15, 2007, the Office of Zoning received an application from Broadcast Center Partners, LLC (the "applicant") for approval of a consolidated PUD for the above-referenced property.

The property that is the subject of this application consists of Square 441, Lots 21, 66, 97, 814, 815, and 854 in Northwest Washington, D.C. (Ward 1) and is located at 1801, 1837, 1839-1847, 1849, and 1851 7th Street, N.W. and 624-632 T Street, N.W. The property is in the ARTS/C-2-B Zone District.

The applicant proposes to develop a new mixed-use residential, office, and retail building containing approximately 319,917 gross square feet above-grade with two levels of underground parking. The project will provide 192,511 gross square feet of residential space, 24,323 gross square feet of retail space, and 103,083 gross square feet of office space. The project will have a density of 6.3 FAR (2.5 for commercial and 3.8 for residential uses), with approximately 180 dwelling units and a building height of 90 feet. The office component of the project is intended to allow Radio One, a major African-American communications and broadcast company, to return its headquarters to the District of Columbia.

For additional information, please contact Sharon S. Schellin, Secretary to the Zoning Commission at (202) 727-6311.

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